

Supreme Court, U. S.
FILED

APR 13 1976

MICHAEL ROBAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1468

M. MORRIN & SON COMPANY, INC.

Petitioner

v.

**BURGESS CONSTRUCTION COMPANY, and
GENERAL INSURANCE COMPANY OF AMERICA**

Respondents

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

DAVIS, GRAHAM & STUBBS

Clyde O. Martz

William A. Bianco

2600 Colorado National Building

Denver, Colorado 80202

WINSTON, CASHATT, REPSOLD,

McNICHOLS, CONNELLY & DRISCOLL

Robert J. McNichols

Patrick A. Sullivan

502 Spokane & Eastern Building

Spokane, Washington

SUBJECT INDEX

	Page
Opinion	1
Jurisdiction	1
Questions Presented	2
Statement of the Case	3
Reasons for Granting the Writ	5
I. The Court of Appeals has sanctioned a departure by the District Court so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision .	6
II. The Court of Appeals has sanctioned a construction of <i>United States v. Howard P. Foley Company, Inc.</i> , 329 U.S. 64 (1946), which departs from the clear meaning of that decision and which is in fundamental conflict with contrary interpretations by the Court of Claims	11
Conculsion	13
Appendix (a) Court of Appeals Opinion	14
Appendix (b) Findings of Fact and Conclusions of Law, November 12, 1973*	28
Appendix (c) Judgment, November 12, 1973	35
Appendix (d) Order Opening, Vacating and Setting Aside Judgment, Findings of Fact and Conclusions of Law and Entering New Findings of Fact and Conclusions of Law, August 29, 1974	37
Appendix (e) Judgment, August 29, 1974	51

TABLE OF AUTHORITIES

	Page
<i>Abbett Electric Corporation v. United States</i> 142 Ct. Cl. 609, 162 F.Supp. 772 (1958)	12
<i>Chicopee Manufacturing Corp. v. Kendall Co.</i> 288 F.2d 719 (4th Cir. 1961)	10
<i>F. D. Rich Co., Inc. v. United States</i> 417 U.S. 116 (1974)	12
<i>George A. Fuller Co. v. United States</i> 108 Ct. Cl. 70, 69 F. Supp. 409 (1947)	12
<i>H. R. Henderson & Co. v. United States</i> 169 Ct. Cl. 228 (1965)	12
<i>In re Las Colinas, Inc.</i> 426 F.2d 1005 (1st Cir. 1970)	11
<i>Kelson v. United States</i> 503 F.2d 1291 (10th Cir. 1974)	7
<i>Louis Dreyfus & Cie. v. Panama Canal Company</i> 298 F.2d 733 (5th Cir. 1962)	7
<i>Neil v. Biggers</i> 409 U.S. 188 (1972)	7
<i>Roberts v. Ross</i> 344 F.2d 747 (3rd Cir. 1965)	7
<i>The Severance</i> 152 F.2d 916 (4th Cir. 1945)	11
<i>Thompson v. City of Louisville</i> 362 U.S. 199 (1960)	10
<i>United States v. El Paso Natural Gas Co.</i> 376 U.S. 651 (1964)	7
<i>United States v. Howard P. Foley Company, Inc.</i> 329 U.S. 64 (1946)	2, 4, 6, 8, 12
28 U.S.C. §1332	4
40 U.S.C. §270(b)	4

IN THE

Supreme Court of the United States

October Term, 1975

No.

M. MORRIN & SON COMPANY, INC.
Petitioner

v.

BURGESS CONSTRUCTION COMPANY, and
GENERAL INSURANCE COMPANY OF AMERICA
Respondents

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

Petitioner M. Morrin & Son Company, Inc. prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on November 10, 1975.

OPINION

The opinion of the Court of Appeals is reported at 526 F.2d 108. A copy of that opinion and two sets of findings of fact and conclusions of law and judgments entered by the trial court are included as appendices (a) through (e).

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on November 10, 1975. A timely petition for rehearing was denied on January 14, 1976. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1) Whether it is a gross departure from the accepted and usual course of judicial proceedings, amounting to a denial of due process of law, for a trial court, after entering findings of fact, conclusions of law and a judgment consistent with the court's evaluation of the evidence throughout the trial, to vacate that judgment and to adopt verbatim, as submitted by counsel, totally contradictory findings, conclusions and judgment, without first permitting opposing counsel a hearing to challenge the sufficiency of evidence to support the findings.

2) Whether the Court of Appeals improperly sanctions such a departure when it sustains such substituted findings on the sole basis that they were not "clearly erroneous" and does not consider either the total divergence of the findings drafted by counsel from those first entered and from the court's comments upon the evidence throughout the trial or the unusual procedure by which the findings were drawn and entered.

3) Whether *United States v. Howard P. Foley Company, Inc.*, 329 U.S. 64 (1946), requires as a matter of law, that a subcontractor be denied contract compensation for increased costs borne by him but admittedly caused by delays of the general contractor in delivering the work sites to him.

4) Whether *United States v. Howard P. Foley Company, Inc.*, *supra*, requires that a subcontractor, who has agreed to complete his work by a fixed time after site delivery, be denied extensions of time under *force majeure* provisions where delays in site delivery resulted in performance of the contract during extremely severe winter weather conditions rather than during the summer months when the work was scheduled by the contract.

5) Whether a termination of a subcontract under a government contract pursuant to a standard termination clause requires that the terminated subcontractor be denied com-

pensation under the settlement provisions of the contract for additional work performed at the request of the general contractor or as a result of the fault of the general contractor.

STATEMENT OF THE CASE

This is a government contract case. Burgess Construction Company ("Burgess") was the general contractor for construction of Soldier Creek Dam in the Uintah Mountain area of Utah. M. Morrin & Son Company, Inc. ("Morrin") was the concrete subcontractor. The subcontract required Morrin to complete the first phase of concrete work to divert a river within the period April 1 through August 1, 1971, subject to conditions that Burgess deliver three critical sites to Morrin fully excavated and ready for concrete fabrication by specified lead dates. The subcontract provided for extensions of the completion date in the event of contractor delays; it incorporated all terms and conditions of the prime contract including *force majeure* and changed condition provisions. It also contained a right of termination clause by which Burgess could take over the subcontract if Morrin failed to comply with the character of work and time for performance provisions of the contract.

Delays in site preparation extended the concrete work from the summer into the winter months of 1971-1972. By reason of consequent scheduling uncertainties and increased costs due to adverse weather conditions, Morrin urged Burgess to defer the contract work until spring. However, Burgess was adamant that operations continue through the winter, in order that Burgess could accelerate completion of the prime contract by one year and save approximately \$500,000.00 in costs.

In December 1971, Burgess requested that Morrin prepare a work schedule that would assure completion of all concrete work necessary for the river diversion by February 15, 1972. When Morrin responded that it could not schedule

completion by a date certain because of weather conditions, Burgess exercised its right of termination.

Burgess instituted an action in the United States District Court for the District of Utah (under 28 U.S.C. § 1332) to enforce its right to take over Morrin's work and to recover damages for Morrin's failure to complete its performance on time. Morrin commenced a separate action under the Miller Act (40 U.S.C. § 270(b)) for damages resulting from Burgess' delay in delivering work sites and from Burgess' wrongful termination of the contract. The actions were consolidated and tried to the court over a period extending from October 16, 1973 to November 12, 1973.

During the trial, counsel for Burgess acknowledged the existence of scheduling changes and admitted Morrin's entitlement to compensation for additional costs resulting from such changes. Only the amount of such extras was disputed. The trial court, on numerous occasions, commented upon the evidence in a manner favorable to Morrin and ultimately announced a result wholly consistent with its evaluation of the evidence throughout the trial.

The court found (1) that Burgess was responsible for delays in delivering work sites to Morrin, (2) that Morrin had not breached its contract, (3) that Burgess had no right to take over the concrete work and (4) that Morrin was entitled to judgment for increased costs plus interest and profit. On the basis of such findings, it entered Judgment for Morrin in the amount of \$815,000.00.

Thereafter, on post trial motions of Burgess, the court concluded on June 28, 1974:

"I have reread United States against Foley. That case, United States v. Howard P. Foley Company, 329 U.S. 64 (1946), controls the interpretation to be given to the critical contract terms in this case. Thus Morrin was entitled to an extension of sixty days, after December

28, 1971, in which to complete the entire first phase of the concrete work.

"However, it is clear from the record and from the admissions of Morrin that Morrin could not complete the entire first phase of the concrete work within 60 days after December 28, 1971; therefore Burgess was entitled, under the contract to terminate Morrin's performance due to Morrin's anticipatory breach of the contract provisions.

"Burgess should prepare and submit proposed findings of fact, conclusions of law, and a proposed order and judgment within 20 days."

Counsel for Burgess thereupon prepared and presented substitute findings of fact and conclusions of law which were adopted verbatim by the court and signed without further hearing.

The substituted findings altered every material finding of fact first entered; they were cast in a form making *Foley* applicable to this case; they wholly omitted findings theretofore made on admission of Burgess regarding additional contract costs incurred by Morrin; and they made an assumption, unsupported by the record, that a critical portion of the site was fully readied for *all* necessary concrete work on December 27, 1971. On the basis of such findings, Judgment was entered for Burgess in the amount of \$330,000.00.

The Court of Appeals affirmed the judgment of the trial court on the basis that the findings were not "clearly erroneous." It apparently disregarded Morrin's vehement objections to the substituted findings of fact.

REASONS FOR GRANTING THE WRIT

This case requires review under the supervisory power of this Court to relieve petitioner from an arbitrary decision of the Honorable Willis Ritter, United States District Court for

the District of Utah, which has so far departed from the accepted and usual course of judicial proceedings as to constitute a denial to petitioner of due process of law. That decision has been inexplicably sanctioned by the United States Court of Appeals for the Tenth Circuit through an inappropriate application of the "clearly erroneous" test to the substituted findings of fact and conclusions of law, despite the fact that such findings and conclusions: (1) were prepared *ex parte* by prevailing counsel; (2) were entered by the court without hearing or modification; (3) were prepared to provide essential elements for a decision summarily announced from the bench; and (4) were wholly inconsistent with the court's comments upon the evidence throughout the trial and with the findings of fact and conclusions of law entered at the conclusion of the trial.

It also presents squarely to this Court the question whether the interpretation given to *United States v. Howard P. Foley Company, Inc.*, 329 U.S. 64 (1946) distorts that decision and conflicts with consistent contrary interpretations by the Court of Claims.

I. THE COURT OF APPEALS HAS SANCTIONED A DEPARTURE BY THE DISTRICT COURT SO FAR FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

Petitioner is aware of the obstacles it faces in persuading this Court to exercise its supervisory jurisdiction and require the reexamination of factual determinations that have already been sanctioned by the Court of Appeals. However, if there ever be a case that merits such attention, we submit that this is such a case. The manner in which "findings" prepared by counsel were accepted without comment or change by the District Court so departs from notions of fairness and accepted modes of procedure as to constitute a denial to peti-

tioner of due process of law. The manner in which they were sustained by the Court of Appeals made the "clearly erroneous" test a matter of form and expediency devoid of substance. Finally, the factual determinations made by the District Court and affirmed by the Court of Appeals were, in fact, clearly erroneous and, as such, may and should be reviewed by this Court. *Neil v. Biggers*, 409 U.S. 1833 (1972).

This Court has frowned upon adoption by District Courts of verbatim findings of fact and conclusions of law prepared by a party to the controversy. *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964). This practice has also been strongly disapproved by Courts of Appeal as "an abandonment of the duty imposed upon trial judges by Rule 52, F.R. Civ. P., because findings so made fail to 'reveal the discerning line for decision. . . .'" *Kelson v. United States*, 503 F.2d 1291 (10th Cir. 1974); *accord, Roberts v. Ross*, 344 F.2d 747 (3d Cir. 1965).

Although the verbatim adoption of findings prepared by counsel may not be reversible error, *per se*, the practice calls for a determination by the appellate court that the trial judge had in fact "considered the case from all angles and reached his decision independently *before* placing reliance on the proposed findings" and the discernment of a measure of "personal analysis and determination." *Louis Dreyfus & Cie. v. Panama Canal Company*, 298 F.2d 733, 738 (5th Cir. 1962) (Emphasis by the court). No such determination was made in the present case.

The trial court's consistent "personal analysis" of the evidence throughout the trial, far from being obscure, manifestly supported determinations of fact and law exactly opposite to those that it adopted as submitted by Burgess' counsel. The record in this case will show:

1. Following lengthy trial the court entered findings of fact and conclusions of law favorable to Morrin's position

and entered judgment for Morrin in the amount of \$815,000. Thereafter, following argument on post-judgment motions *some seven months later*, without hearing any additional evidence, the court vacated its findings and judgment and directed Burgess to prepare findings of fact, conclusions of law and judgment in its favor.

2. The findings of fact prepared by counsel for Burgess bore no relationship to the findings initially entered or to the comments and opinions expressed by the trial court during trial and on the first hearing on post-judgment motions. They asserted damages to Burgess in the amount of \$330,000.

3. The court accepted the findings prepared by counsel and entered judgment thereon without the slightest consideration of the inconsistencies created between the first and second set of findings, the lack of evidence to support some of the new findings so made, or the lack of any opportunity for the surprised subcontractor to test such findings prior to their entry.

4. The court purportedly reversed its decision solely on the premise that *United States v. Howard P. Foley Company, Inc., supra*, precluded Morrin from recovering damages because of Burgess' delay in delivering work sites as scheduled. It concluded generally from that determination that Morrin no longer had any excuse for delaying completion of the concrete work because of changes and changed conditions for which Burgess was responsible. The court implicitly held that it was immaterial whether the work had to be performed under adverse winter weather conditions, and found that Morrin had somehow become responsible for the contract delays. No rational explanation can be found in the *Foley* case or in the post-judgment arguments for altering such findings and conclusions.

Foley could not be applicable to the present case under the original findings of the court. If *Foley* were applicable, it

would be limited by its terms to the question whether Morrin was entitled to damages as a result of the admitted scheduling delays of Burgess and, as such, it should not have affected the ultimate decision in any substantive way.

5. The decision of the trial court to vacate a judgment of \$815,000 for petitioner and to enter judgment against petitioner for \$330,000 had to rest upon the following critical findings of fact and conclusions of law:

(a) That *all* site preparation work required for the performance of petitioner's obligations had been completed by the contractor or other subcontractors on December 27, 1971. The Court will find the record lacking in evidence to support this critical finding. Only one part of the critical area was ready on this date, not the entire area, as required by the subcontract.

(b) That petitioner was not entitled to extensions under *force majeure* provisions incorporated into the contract by reason of exceptional obstacles of winter work. The trial court vacated a finding that *force majeure* conditions existed and failed to include a contrary substitute finding that they did not so exist. The evidence was uncontroverted that such conditions existed.

(c) That the contractor was not responsible for increased costs to petitioner for changes and changed conditions under the contract as a consequence of delays in preparation of sites for petitioner to perform its contract obligations. The trial court vacated a finding that changes and changed conditions did cause petitioner to incur costs of \$734,664 (including overhead and profit) in excess of compensation paid under the contract. No substitute finding was made that such costs were not in fact incurred.

(d) That petitioner was not entitled to setoff against cost of completion damages, on takeover of the contract by Burgess, costs found initially by the court to be due Morrin

for changes and changed conditions. The substitute findings wholly ignored the contract termination clause under which Morrin was entitled to an offset for all amounts it was entitled to receive under the subcontract. The court did not find against such entitlements and, in fact, could not do so because such offsets were admitted by Burgess during the course of the trial.

The key findings were, in fact, no more than Burgess' claims for relief.

The inevitable result of this chain of procedural irregularity was a denial to petitioner of a full opportunity to have the facts underlying an award of damages against it tested in a court of law. Implicit in such a testing is a reasoned weighing of evidence, an application of known rules to such evidence and the rendering of a decision which, right or wrong, is a product of this process. The trial court here has not merely adopted findings which were not the product of independent judicial consideration; it rejected the apparent product of its own reasoning process (based upon numerous comments at trial). In so doing, the court departed completely from the concept of a trial as we know it. *Cf. Thompson v. City of Louisville*, 362 U.S. 199 (1960). The failure of the court to allow petitioner to be heard on these "findings" prior to their entry, in itself, amounts to a denial of due process. *Chicopee Manufacturing Corp. v. Kendall Co.*, 288 F.2d 719, 725 (4th Cir. 1961).

The smooth functioning of the judicial system is sorely strained by procedures that (1) permit a trial court to displace a judgment of \$815,000 for one party (based upon findings of the court that were consistent with its bench evaluation of the evidence during trial) with a judgment against that party in the amount of \$330,000 (resting wholly upon new and inconsistent findings supplied verbatim by private counsel) and that (2) lead an appellate court to affirm such *ex parte* findings on the basis that the evidence was

complex and conflicting and the findings were not "clearly erroneous." Several circuits have grappled with the propriety of the "clearly erroneous" standard for review in circumstances where the trial court's findings are clearly not the product of judicial determination and have denied that such findings are entitled to the "weight and dignity" they would merit "had they represented the unfettered and independent judgment of the trial judge." *The Severance*, 152 F.2d 916, 918 (4th Cir. 1945); *accord, In re Las Colinas, Inc.*, 426 F.2d 1005, 1010 (1st Cir. 1970). To date, however, no standard exists by which the Circuits may be guided in their efforts to scrutinize questionable findings and judgments. This Court must, in the exercise of its supervisory power, establish such guidelines which will guarantee to litigants the right to a judgment by a court of law.

II. THE COURT OF APPEALS HAS SANCTIONED A CONSTRUCTION OF *UNITED STATES v. HOWARD P. FOLEY COMPANY, INC.*, *SUPRA*, WHICH DEPARTS FROM THE CLEAR MEANING OF THAT DECISION AND WHICH IS IN FUNDAMENTAL CONFLICT WITH CONTRARY INTERPRETATIONS BY THE COURT OF CLAIMS.

Apart from the procedural irregularities that have prompted this petition, the case should be reviewed for its potentially far-reaching substantive impact on government contract law. The Court of Appeals, in affirming the decision of the trial court, has held that conditions in government contracts for delivery of sites by specific dates are precatory at most and impose no enforceable obligations upon the government or general contractor. This determination will have a drastic impact on government contract and subcontract relationships throughout the country; contractors and subcontractors under standard contracts will be placed at the mercy of the scheduling whims of the other contracting party.

The Court of Appeals also sanctioned denial to the petitioner of the protection of *force majeure* contract clauses which provide for time extensions where the delays of the government or general contractor cause the subcontractor to meet performance deadlines under extremely severe weather conditions.

Finally, the Court of Appeals affirmed the use of a measure of damages which would deny to a terminated subcontractor recovery for additional work performed at the request of the general contractor or because of the fault of the general contractor.

The jurisdiction of this Court to review such determinations on *certiorari* is fully justified on the following bases:

1. *United States v. Howard P. Foley Company, Inc., supra*, has been construed and applied in this case contrary to its express limitations. Although the lower court applied the case to a subcontract, not involving the Constitution or statutes of the United States, a federal question is presented by the fact that (a) the trial court purported to determine the rights of the parties under *United States v. Howard P. Foley Company, Inc., supra*, a federal public contract case, and (b) petitioner asserted a Miller Act claim against a general contractor. This Court has held in *F. D. Rich Co., Inc. v. United States*, 417 U.S. 116 (1974) that, for consistency in policy and decision, Miller Act claims by contractors and subcontractors present federal questions on substantive as well as remedial issues.

2. The decision of the Court of Appeals squarely conflicts with decisions of the Court of Claims. *Abbett Electric Corporation v. United States*, 142 Ct.Cl. 609, 162 F.Supp. 772 (1958); *George A. Fuller Co. v. United States*, 108 Ct.Cl. 70, 69 F.Supp. 409 (1947); *H. R. Henderson & Co., Inc. v. United States*, 169 Ct.Cl. 228 (1965).

CONCLUSION

For the reasons set out herein, we pray that *certiorari* be granted.

Respectfully submitted,

DAVIS, GRAHAM & STUBBS

Clyde O. Martz

William A. Bianco

2600 Colorado National Building
Denver, Colorado 80202

WINSTON, CASHATT, REPSOLD,

MCNICHOLS, CONNELLY & DRISCOLL

Robert J. McNichols

Patrick A. Sullivan

502 Spokane & Eastern Building
Spokane, Washington

APPENDIX (a)

BURGESS CONSTRUCTION COMPANY, an Alaska Corporation,
Plaintiff-Appellee,

v.

M. MORRIN & SON COMPANY, INC., a Utah Corporation, and
General Insurance Company of America, an insurance com-
pany,

Defendants-Appellants.

U. S. for the Use and Benefit of M. MORRIN & SON COM-
PANY, INC., a Utah Corporation,
Plaintiff-Appellant,

v.

BURGESS CONSTRUCTION COMPANY, an Alaska Corporation,
and General Insurance Company of America, a corporation,
Defendants-Appellees.

No. 74-1701.

United States Court of Appeals,

Tenth Circuit.

Argued May 23, 1975.

Decided Nov. 10, 1975.

Rehearing Denied Jan. 14, 1976.

Robert J. McNichols and Patrick A. Sullivan, Spokane,
Wash., for appellants M. Morrin & Son Co., Inc., and Gen.
Ins. Co. of America.

David K. Watkiss, Salt Lake City, Utah, for appellees
Burgess Const. Co. and Gen. Ins. Co. of America.

Before HILL, SETH and HOLLOWAY, Circuit Judges.

HILL, Circuit Judge.

This litigation arose from the Bureau of Reclamation Soldier Creek Dam project. The appellee, Burgess Construction Company (hereinafter referred to as Burgess), was the prime contractor, and the appellant, M. Morrin & Son Company, Inc. (hereinafter referred to as Morrin), was the concrete subcontractor. Delays in the completion of the subcontract work led to a termination and take-over of Morrin's work by Burgess. Burgess then instituted an action to enforce its right to take over Morrin's work and to recover damages for Morrin's failure to complete its performance on time. Morrin commenced a separate action under the Miller Act¹ alleging Burgess breached the subcontract by delaying Morrin's access to work sites and by wrongfully terminating the subcontract. The actions were consolidated and tried to the court without a jury. General Insurance Company of America, the surety of both parties, was a codefendant in each case but did not actively participate in the litigation.

At the trial, the court entered judgment for Morrin, and findings of fact and conclusions of law consistent therewith, at the close of the evidence. Argument of the case was deferred until post-trial motions by Burgess were heard. After the parties had submitted briefs and argued the motions, the court set aside the prior judgment and entered new findings of fact and conclusions of law. Judgment was entered for Burgess in the amount of \$330,345.88 plus interest. Morrin has appealed.

The facts are complicated and continue to be disputed on appeal. In October, 1970, Burgess was awarded the contract for the construction of a large earthen dam on Soldier Creek, approximately 80 miles east of Salt Lake City, Utah. Thereafter, Morrin and Burgess entered into negotiations culminating in the execution of a subcontract under which Morrin was to do certain concrete work on the project.

¹40 U.S.C. § 270b authorizes such suits in federal court on a government contractor's bond.

While Burgess conducted the earth-moving operations for building the dam, the river had to be diverted through tunnels. The relevant portions of the Morrin-Burgess subcontract called for Morrin to do the concrete work necessary to allow diversion through what was known as the lower tunnel. The factual dispute involves primarily the work on the lower inlet tunnel, the lower outlet tunnel, the gate chamber, and the stilling basin. The lower inlet tunnel is a circular concrete tunnel six feet in diameter and 750 feet long. The lower outlet tunnel is in the shape of an inverted U. It is eight feet high and 800 feet long. Between the inlet and outlet tunnels is the gate chamber — a large, cavernous area 36 feet high and 30 feet long. It contains steel tunnel liners and hydraulic gates which can be raised or lowered to control the flow of the river. The stilling basin is an above-ground structure resembling a large concrete building. Its purpose is to absorb the force and turbulence as the water flows out of the tunnels. Burgess also subcontracted other aspects of the diversion work, including the excavation and the fabrication, delivery and installation of the steel liners and gates.

The issues presented in this appeal relate to the obligations of the parties under the time of performance provisions of the subcontract. Burgess' successful bid was based on its plan to finish construction in two years, even though its contract with the Bureau of Reclamation allowed over three years. Completion within this time frame required diversion of the river before the spring of 1972. This fact was discussed by the parties during contract negotiations and is reflected in the time for completion stated in the subcontract. Morrin was obligated to complete the work here in question by August 1, 1971, with extensions of time equal to any delay in gaining access to the work sites on specified dates.

After the execution of the subcontract, Morrin submitted a schedule to Burgess showing its planned sequence of operation. Morrin planned to work first in the lower inlet tunnel,

beginning at the gate chamber and moving outward to the tunnel entrance. The second sequence of operations was the contemporaneous installation of the lower outlet tunnel and the gate chamber. The stilling basin was scheduled for continuous work by a separate crew beginning at the same time as the lower outlet tunnel and gate chamber. Morrin planned to utilize a small railway system to transport both the concrete and the pump, so that no concrete would have to be pumped in from the entrance to the tunnels. Morrin contemplated laying track once into the lower inlet tunnel and once into the lower outlet tunnel, thereby allowing placement of the gate chamber while the railroad was installed in the lower outlet tunnel.

Because of delays in gaining access to work areas, Morrin was required to work first in the stilling basin, second in the lower outlet tunnel, third on the lower inlet tunnel, and fourth in the gate chamber. Instead of installing the railroad twice, Morrin had to install it five times. The extent of delay in each work area is set out below.

LOWER OUTLET TUNNEL

The excavation was to be completed by April 1, 1971. Morrin was able to commence some work in the area on May 18, but the excavation was not fully completed until June 21, 1971. Morrin completed this work on October 28, requiring over 100 working days instead of the 48 its schedule predicted.

LOWER INLET TUNNEL

This area was likewise to be fully excavated to give Morrin access by April 1, 1971. There is evidence in the record that it was accessible in July and that Burgess requested work be commenced at that time. Morrin did not begin pouring concrete until November.

GATE CHAMBER

The gates and steel tunnel liners were to be delivered by May 15, 1971, and installed by June 1. They were a prerequisite to Morrin's work in the gate chamber because they required embedments in the concrete. The fabricator experienced difficulty in obtaining the type of steel necessary for the liners and did not complete delivery until September 18, 1971. Installation of the gates and liners was not finished until December 26, more than six months beyond the date anticipated in the contract.

THE STILLING BASIN

Morin scheduled its work here to begin on May 10, 1971, and end on July 17. Work was actually commenced on April 26 and completed in December. A portion of the area was left unexcavated until September 1.

As a result of the delays, Morrin was forced to continue working into the winter months when temperatures dropped as low as -40 degrees. Morrin failed to progress as Burgess felt it should, and on January 17, 1972, Burgess gave notice of its intention to terminate Morrin and prosecute the work itself with Morrin's equipment. Such action was authorized by the subcontract for failure to perform on time. On January 21, 1972, Burgess began the remainder of Morrin's work and completed it in May.

Summarizing the evidence and contentions of each party, Morrin contends Burgess was bound by the contract to make work sites available to Morrin on specified dates and is liable for damages resulting from its failure to do so. Morrin argues its inability to complete performance on time was due solely to delays caused by other subcontractors and attributable to Burgess. Morrin's witnesses indicated it spent over 700 work hours removing rock protrusions and muck left in the tunnels by the excavator in violation of the subcontract terms. Morrin's evidence further indicated that changes in

the sequence of its work made timely performance impossible and substantially increased its costs. It also contends winter work was not contemplated when the contract was made, and that winter weather conditions further added to the time and cost of its performance.

Burgess contends it was not bound to make work sites available on any certain date or in a certain order. It contends the dates mentioned in the subcontract were stated as conditions to Morrin's duty to perform by the date set in the subcontract. Burgess' evidence indicates Morrin's inability to perform on time was caused by its inefficiency. Remedial work for correcting errors, inadequate crews, and inadequate work shifts were among the reasons given by Burgess' witnesses for Morrin's delay. There was evidence that the tunnels had been checked for rock protrusions and approved, and any extra work in this regard would have been insignificant. An expert in this type of construction testified that Morrin should have been able to complete work on time notwithstanding the schedule changes. He did not consider it necessary to work in the sequence Morrin planned. Burgess' evidence also indicated winter work was contemplated when the contract was entered, and winter work did not materially change the nature of Morrin's performance.

The fundamental issue in this appeal is whether Burgess was contractually bound to give Morrin access to work sites on the dates stated in the contract. If it was, Burgess breached the contract and the judgment must be reversed. Morrin argues first that Burgess breached an express covenant to provide access on time. The relevant contract clauses state:

SECTION 4. TIME OF PERFORMANCE: The Subcontractor agrees to keep himself informed as to the progress of the project and to faithfully prosecute his work, and the several parts thereof, at such times in such order as the Contractor considers necessary to keep the same sufficiently in advance of the other parts of the

project and to avoid any delay in the completion of the construction as a whole. The scheduled TIME OF PERFORMANCE of the work forming a part of this Subcontract is *See Exhibit B*.

The text of Exhibit B reads:

Time for completion of this work shall be as follows:

1. Concrete in lower tunnel, stilling basins and lower trash rack shall be complete to allow diversion of river through tunnel on or before 1 August 1971 *subject to*:
 - a. Lower tunnel excavation *must be* complete to allow access from both ends by 1 April 1971.
 - b. Excavation for lower tunnel chute and the stilling basins for both chutes *must be* completed by 1 April 1971.
 - c. Gates and steel liners for lower gate chamber *must be* delivered on or before 15 May 1971 and installed not later than 1 June 1971.

The subcontractor will be entitled to a time extension equal to any delay created by a, b or c above. (emphasis added)

[1-3] Morrin argues the use of the words "must be" creates an unconditional obligation by Burgess to complete the work necessary for site access on the stated dates. However, we cannot look only to the words Morrin chooses to emphasize; we must interpret the contract as a whole. 3 Corbin on Contracts § 549 (1960). Clause 1 of Exhibit B is a promise by Morrin to complete its work by August 1, 1971, "subject to" the work necessary for site access being completed at times stated in a, b and c. The words "subject to" usually indicate a condition to one party's duty of performance and not a promise by the other. 17 Am. Jur.2d Contracts § 320 (1964). The structure of Exhibit B, clause 1, in its entirety also indicates that subparts a, b and c are not independent

covenants, but are conditions. The inferior position of the alleged promises by Burgess indicates the parties did not consider them independent obligations of the same import as the obligation clearly assumed by Morrin in the primary clause. This interpretation is in harmony with Section 4 of the form contract of which Exhibit B is made a part. In Section 4 Burgess expressly reserves the right to direct the time and order of Morrin's performance. We do not find an expression of intent in Exhibit B to bind Burgess otherwise. The record shows that delay is not unusual in construction projects of this magnitude. The provision for extending Morrin's time in the event of delay by Burgess indicates this possibility was contemplated by the parties when the contract was made. In view of the wording and structure of the contract clause and the surrounding circumstances, we do not believe the parties intended to bind Burgess absolutely to provide site access on the specified dates. Rather, we agree with the trial court that this clause states conditions to Morrin's duty to complete its performance at the time stated in the subcontract.

[4-7] A contracting party may still be liable for damages caused by delay when there is no unqualified warranty or express covenant to provide site access at a definite time. Morrin argues that under the rule of *George A. Fuller Co. v. United States*, 69 F.Supp. 409, 108 Ct.Cl. 70 (1947), Burgess has breached an implied promise it would do nothing to hinder or prevent Morrin's performance. Burgess relies primarily on *United States v. Howard P. Foley Co.*, 329 U.S. 64, 67 S.Ct. 154, 91 L.Ed. 44 (1946),² where the Supreme Court held an extension of time cause similar to the one in the present case provided the injured contractor's sole

²The parties have briefed this case relying primarily on federal cases involving suits on a prime contract by a contractor against the government. In such cases, federal law controls. The law to be applied in suits on subcontracts is not so clear. When the construction of the Miller Act is not in issue and the United States is not a party to the subcontract, some circuits have held state law controls. Other circuits have held federal law controls in all actions under the Miller Act.

remedy. Morrin treats these cases as stating two separate rules and even argues *Foley* is no longer good authority.³ However, subsequent cases have harmonized *Fuller* and *Foley*. Both cases are based on the rule that unreasonable delay is a breach of an implied obligation not to hinder or delay the other party's performance, in the absence of a contract clause contemplating and excusing the delay.⁴ The court in *L. L.*

These cases are collected in *United States v. Western Cas. & Sur. Co.*, 498 F.2d 335, 338 n.4 (9th Cir. 1974). In a Miller Act action on a subcontract, the Supreme Court recently held that uniform rules of national application should control the awarding of attorney's fees. Whether the holding is limited to attorney's fees or extends the application of federal law to all Miller Act cases is not immediately clear. *F. D. Rich Co., Inc. v. United States*, 417 U.S. 116, 94 S.Ct. 2157, 40 L.Ed.2d 703 (1974).

We do not distinguish between state and federal law in this opinion because we find no conflict between our decision and the law of Utah as expressed in *Russell v. Bothwell & Swaner Co.*, 57 Utah 362, 194 P. 1109 (1920). *United States v. Western Cas. & Sur. Co.*, *supra*.

³Morrin points out that because the result in *Foley* and its progenitors, *United States v. Rice*, 317 U.S. 61, 63 S.Ct. 120, 87 L.Ed. 53 (1942), and *H. E. Crook Co. v. United States*, 270 U.S. 4, 46 S.Ct. 184, 70 L.Ed. 438 (1926), was considered unjust, changes were made in the required clauses in government contracts. When the most recent changes were made in 41 C.F.R. § 1-7.601 *et seq.*, avoiding the adverse effects of the "Rice" doctrine was one of the expressed reasons. 32 Fed.Reg. 16269 (1967). These required clauses provide for equitable adjustments to the contract in administrative proceedings. They do not change the law of contracts in suits seeking judicial relief for breach of contract. See *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 86 S.Ct. 1545, 16 L.Ed.2d 642 (1966). As recently as *Broome Constr., Inc. v. United States*, 492 F.2d 829, 203 Ct.Cl. 521 (1974), the Court of Claims followed the *Foley* holding as a vital principle of law.

In any event, this case does not involve the standard form clauses. The dispute is over a clause drawn and added to the contract by the parties.

⁴Although not always expressed in exactly the same terms, we believe this rule has been consistently followed. *Broome Constr., Inc. v. United States*, 492 F.2d 829, 203 Ct.Cl. 521 (1974); *L. L. Hall Constr. Co. v. United States*, 379 F.2d 559, 177 Ct.Cl. 870 (1966); *Kent v. United States*, 343 F.2d 349 (2d Cir. 1965); *Commerce Int'l Co. v. United States*, 338 F.2d 81, 167 Ct.Cl. 529 (1964); *Laburnum Constr. Corp. v. United States*, 325 F.2d 451, 163 Ct.Cl. 339 (1963); see *Restatement of Contracts* § 315.

Hall Construction Co. v. United States, 379 F.2d 559, 563, 177 Ct.Cl. 870 (1966), stated that in cases under this rule:

the questions on which liability turns . . . are whether defendant was the cause of the delays here, whether it failed to use reasonable diligence and good faith in performance of its responsibilities under the contract, and whether the contract contemplated and excused the delays.

[8, 9] First, we consider whether the delays which occurred were contemplated and excused by the subcontract. It provides: "The subcontractor will be entitled to a time extension equal to any delay created by a, b or c above." An extension of time clause alone does not necessarily provide an exemption from damages for delay, but:

It may, in conjunction with other facts, indicate, as it was held in the *Foley* case, that the . . . [defendant] did not obligate itself to provide materials or a site or to complete certain work by a certain time. In such cases it is a reasonable construction of the contract that delays in doing these things were anticipated and fully provided for by the provision for an extension of time.

Kehm Corp. v. United States, 93 F.Supp. 620, 119 Ct.Cl. 454 (1950).⁵ Whether there were "other facts" indicating Burgess was not obligated to provide the work sites at any certain time and not subject to the imposition of damages for delay is largely a question of fact for the trial court. Although the evidence is not overwhelming on this point, Burgess introduced evidence that it was not the intent of the parties to bind Burgess to pay damages should delay of the type en-

⁵Some cases state there must be a clause "expressly" exempting defendant from liability. See, e. g., *L. L. Hall Constr. Co. v. United States*, 379 F.2d 559, 177 Ct.Cl. 870 (1966). Under this statement, an extension of time clause could be considered insufficient under any circumstances to "expressly" negate liability for damages. However, a reading of several cases (see cases cited note 4, *supra*) indicates *Kehm* correctly states the rule. Moreover, *Hall* cites *Kehm* with approval.

countered actually occur. It was not clearly erroneous⁶ for the trial court to base its decision on this evidence rather than Morrin's evidence to the contrary. Therefore, we affirm the trial court's holding that the delay was contemplated by the subcontract, and that Burgess is not liable for damages caused by the delay.

[10, 11] Even if we decided the extension of time was not the sole remedy, Morrin still could not recover. Breach of an implied promise not to hinder or delay the other party's performance is not established merely by proving there was delay. The delay must be unnecessary, unreasonable or due to defendant's fault. *Broome Construction, Inc. v. United States*, 492 F.2d 829, 203 Ct.Cl. 521 (1974).⁷ There is no contention that Burgess acted in bad faith. On the contrary, Morrin took the position that the reason or necessity for the delay was immaterial. When Burgess' counsel sought to examine a witness concerning the reason for delay in obtaining the steel for the gates and tunnel liners, Morrin objected. Its counsel stated, "I don't see any materiality of his difficulty in obtaining steel. . . . As far as we were concerned, there was a certain time it was supposed to be there, and where he got it and what difficulty he had is immaterial to this case. . . ." The objection was sustained.

Nevertheless, testimony was admitted indicating Burgess acted in good faith and its delay was not unreasonable or due to its fault. This testimony was admitted on issues primarily relating to whether Morrin's inability to complete its work on time was due to Burgess' delay or its own inefficiency. We do not attribute perfection to Burgess. However, neither do we find the type of delay by Burgess that constitutes a breach of an implied promise not to hinder or delay the subcontractor.

⁶F.R.Civ.P. 52(a).

⁷ See *Chalender v. United States*, 119 F.Supp. 186, 127 Ct.Cl. 557 (1954); cases cited note 4, *supra*; 4 Corbin on Contracts § 947 (1951).

[12, 13] We must now determine whether Burgess breached the subcontract by terminating Morrin and taking over the remainder of its work. Morrin does not question the validity of the termination clause which gave Burgess the right to terminate should Morrin fail to comply with the time of performance provisions of the subcontract.⁸ Morrin's only argument in this regard is that the decision to terminate was based on inaccurate information concerning the cause of Morrin's inability to complete its work on time. However, there is substantial evidence in the record confirming that Morrin was not able to complete performance on time and that Burgess was justified in exercising its power of termination.⁹ We find that Burgess complied with the terms of the subcontract's termination clause and was not guilty of a breach.

[14] The trial court enumerated 31 findings of fact. Morrin contends 19 of them were clearly erroneous. Were we to look only at Morrin's evidence, we might be able to agree with its contentions, but we must look at the whole record.¹⁰ As the facts stated in this opinion disclose, the evidence was conflicting in varying degrees on every major point of contention. In such cases the "clearly erroneous" rule creates a difficult burden for an appellant. To discuss each

⁸Termination clauses are valid. *Goltra v. Weeks*, 271 U.S. 536, 46 S.Ct. 613, 70 L.Ed. 1074 (1926); 3A Corbin on Contracts § 721 (1960).

⁹There was evidence that Burgess held several meetings with Morrin prior to the take-over and had expressed its concern with Morrin's poor performance. As early as October 7, 1971, Burgess informed Morrin that unless its performance improved, Burgess might take over the work. To this Dean Morrin responded, "Be my guest." Burgess made repeated requests for an updated completion schedule, but received no estimate until after the termination letter. An expert witness testified Morrin should have been able to complete performance within the time allowed in the contract with extensions for delay in site access. In addition, a Bureau of Reclamation inspector testified Morrin's work was substandard and inefficient. He attributed the causes of delay to Morrin.

¹⁰*Kelson v. United States*, 503 F.2d 1291 (10th Cir. 1974).

finding of fact individually would require too many pages of this opinion. Therefore, we will group them according to the issues.

We have already stated our opinion that the evidence was sufficient to support the trial court's finding that Burgess breached neither an express nor an implied promise to provide work sites on certain dates. We likewise have found the evidence sufficient on issues relating to the termination and take-over of Morrin's work. However, Morrin makes an additional argument on this point. The trial court found the last work on which Morrin's time of performance was conditioned was completed on December 27, 1971. Morrin argues this is clearly erroneous because one witness, Morrin's president, testified that work not mentioned in the subcontract, consisting of bypass piping and electrical conduit, was not complete until February 21, 1972, and that four concrete pours in the gate chamber could not be made until this was done. According to Morrin, the trial court should have found the subcontract allowed Morrin two months from February 21, rather than December 27, to complete its work. We do not believe the trial court's finding is erroneous. Other witnesses testified the gate chamber was available for pouring concrete in accordance with the terms of the subcontract on December 27, 1971. Moreover, the evidence indicates it was clear at the time of termination that Morrin would be unable to complete on time. Nowhere does Morrin argue that it could.

[15] Of the other findings Morrin contests, many concern whether Morrin's inability to perform on time was caused by its inefficiency or by extra work and schedule changes forced on it by Burgess. There was substantial evidence that the extra work was insignificant and the schedule changes should not have prevented Morrin from completing on time. In any event, error in these findings could not be a basis for reversal. The schedule of operations was for the convenience of Burgess and Morrin and other subcontractors in

coordinating the work. Burgess did not guarantee that Morrin would be allowed to work in the sequence its schedule proposed. On the contrary, Burgess retained the right to direct the order of Morrin's performance in the manner necessary to the completion of the project as a whole.

[16, 17] Finally, Morrin contends certain items of damages in the judgment are not supported by the evidence. Morrin contends it was erroneous to include an amount for overhead in Burgess' damages for the cost of completing Morrin's work. The amount was calculated by allocating a percentage of Burgess' total overhead to the work completed on the Morrin subcontract. Morrin argues there is no proof the extra work actually increased Burgess' overhead or, if it did, in what amount. Under the circumstances, however, this was the best measure available. Overhead is a proper element of cost of completion damages, and an allocation is a proper measure of the amount. *Vitex Mfg. Corp. v. Caribtex Corp.*, 377 F.2d 795 (3d Cir. 1967); *Grand Trunk Western R. Co. v. H. W. Nelson Co., Inc.*, 116 F.2d 823 (6th Cir. 1941). We have examined the record and conclude there was no error in the other items of damage contested on appeal by Morrin.

Although Morrin may have suffered substantial losses on this transaction, under the terms of the subcontract Burgess committed no breach and Morrin is not entitled to damages. The evidence did establish a breach by Morrin. We find no error in the judgment of the district court.

Affirmed.

APPENDIX (b)

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH**

CENTRAL DIVISION

BURGESS CONSTRUCTION COMPANY,
an Alaska corporation,
Plaintiff,

vs.

M. MORRIN & SON COMPANY, INC.
a Utah corporation; and GENERAL
INSURANCE COMPANY OF AMERICA,
an insurance company,
Defendants.

C-26-72

USA/FOR THE USE AND BENEFIT OF
M. MORRIN & SON COMPANY, INC.,
a Utah corporation,
Plaintiff,

vs.

BURGESS CONSTRUCTION COMPANY,
an Alaska corporation; and GENERAL
INSURANCE COMPANY OF AMERICA,
a corporation,
Defendants.

C-158-72

**FINDINGS OF
FACT and
CONCLUSIONS
OF LAW**

These consolidated actions came to trial October 16, 1973 and concluded November 10, 1973. BURGESS CONSTRUCTION COMPANY, an Alaska corporation ("BURGESS") and GENERAL INSURANCE COMPANY OF AMERICA, its surety, were represented by their attorneys,

Pugsley, Hayes, Watkiss, Campbell & Cowley, Mr. David K. Watkiss and Mr. Robert Campbell of counsel; M. MORRIN & SON COMPANY, INC., a Utah corporation ("MORRIN") and its surety, GENERAL INSURANCE COMPANY OF AMERICA, were represented by their counsel, Van Cott, Bagley, Cornwall & McCarthy, Mr. Clifford L. Ashton of counsel, Winston, Cashatt, Repsold, McNichols, Connelly & Driscoll, Mr. Patrick A. Sullivan, Mr. Robert J. McNichols, and Mr. Robert Taylor of counsel, and Young, Thatcher & Glasmann, Mr. Blaine V. Glasmann of counsel.

GENERAL INSURANCE COMPANY OF AMERICA, a Washington corporation ("GENERAL") was the surety on the prime contractor's bond and also surety on the subcontractor's bond running to the prime contractor. GENERAL was not represented by independent counsel.

The parties presented evidence and rested their respective cases on November 10, 1973.

The Court hereby makes the following

FINDINGS OF FACT

1. BURGESS is an Alaska corporation and was the general contractor upon a United States Government project commonly known as the Soldier Creek Dam located within the jurisdiction of the United States District Court for the District of Utah.

2. Pursuant to the provisions of 40 U.S.C. § 270, *et seq.*, GENERAL as surety and BURGESS as principal provided a performance and payment bond for the protection of those furnishing labor, materials or equipment to the subject project.

3. BURGESS as general contractor entered into a contract with the United States of America for the construction of the project and elected to perform the primary work in a

period of two years rather than the three-year period contemplated by the general contract.

4. In the fall of 1970, BURGESS negotiated a subcontract agreement with MORRIN under the terms of which MORRIN was to perform the labor and provide the materials and equipment for completing the concrete phases of the project. The work which MORRIN contracted to do pursuant to the subcontract consisted of the placement of concrete and reinforcing steel in certain underground tunnels and chambers together with certain above ground concrete work.

5. The negotiations culminated in the execution of the subcontract, which required MORRIN to complete certain concrete work for river diversion by August 1, 1971, subject to BURGESS meeting three critical preparatory conditions. In making this determination, BURGESS was motivated by its desire to place vast quantities of earth fill within two seasons rather than three so that it could prevent the expenditure of \$550,000 in the use of heavy earth-moving equipment.

6. As a result of these negotiations, BURGESS contracted with MORRIN and agreed to make critical work areas needed by MORRIN available in the manner and at the times set forth in Exhibit B to the subcontract agreement (Exhibit D-2). BURGESS failed to comply with any of the critical, Exhibit B provisions and as a direct result of such failure by BURGESS, MORRIN was required to completely reschedule its work; to perform it in a sequence not planned upon or contemplated by the parties and over a period substantially in excess of the period contracted for and into the severe winter months of 1971 and 1972.

7. Immediately upon learning that BURGESS was not complying with its obligations under the subcontract, MORRIN gave notice, both written and oral, that MORRIN would not be able to do the concrete work within the time and in the

manner planned and would hold BURGESS responsible for all additional costs incurred.

8. After it became apparent to BURGESS that BURGESS could not meet its obligations to make the necessary areas available to MORRIN as contracted, BURGESS rescheduled the date for diverting the river from the initial date of late summer 1971 until mid-February of 1972. BURGESS then directed MORRIN to proceed to do the work in the manner and over the time period in which it was actually done.

9. BURGESS as the general contractor had the duty to coordinate the work of other contractors and failed to properly do so. This failure, along with other delays caused by BURGESS, contributed to MORRIN'S inability to perform its work in proper and timely sequence.

10. Because of the failure of BURGESS to comply with the subcontract, the work which MORRIN performed on the project was performed in a manner and under conditions substantially different than those contracted for.

11. As a result MORRIN was required to provide labor, materials and equipment over the period April, 1971 into January, 1972 in an effort to complete the concrete work necessary for diversion rather than being permitted to do it in the four-month period April to July of 1971.

12. MORRIN'S bid to BURGESS which equalled the amount of the subcontract was reasonable and had BURGESS complied with its contractual obligations to MORRIN under the subcontract agreement, MORRIN could have completed the concrete work necessary for diversion within the time frame set forth in the subcontract and would have realized a reasonable profit.

13. As a direct result of the breach of contract by BURGESS, specifically its failure to provide the areas of work at the times and in the condition required by the subcontract,

and its failure to properly coordinate the work, MORRIN incurred substantial additional costs for labor and equipment which would not have been incurred had MORRIN been able to perform in the manner and sequence contemplated by the subcontract.

14. The evidence introduced by MORRIN reasonably reflects the damages incurred by it, and said evidence shows that all labor, materials, and equipment furnished by MORRIN made it possible for BURGESS to avoid expenditures of \$550,000 or more in later stages of BURGESS'S work.

15. In January of 1972, BURGESS terminated MORRIN'S subcontract contending that MORRIN was responsible for the delay in completing the necessary concrete work required to divert the river. In fact such delay was not the responsibility of MORRIN but was solely the responsibility of BURGESS.

16. Subsequent to such termination, MORRIN was directed to remove its personnel from the project and BURGESS appropriated quantities of MORRIN'S equipment and materials for its own use to complete the work. BURGESS failed to pay MORRIN for such equipment and materials or the amount BURGESS agreed was owing to MORRIN at that time.

17. MORRIN'S costs in performing the work under the subcontract were determined by Ernst & Ernst, Certified Public Accountants and such audit reflects MORRIN'S actual costs together with general and administrative expenses. The costs and expenses reflected in said audit are reasonable.

18. The actual costs incurred by MORRIN in performing the work which MORRIN performed including a reasonable allowance for general and administrative expenses of 5.86 percent and the reasonable value of MORRIN'S equipment which was utilized by BURGESS in completing the

subcontract work after termination is \$1,175,743.64. A reasonable profit of ten percent equals \$117,574.36. The reasonable costs incurred by MORRIN plus a ten percent profit totals \$1,293,318.00.

19. As of the time of termination MORRIN had been paid on progress payments throughout the contract period \$520,514.17, and under the theory of *quantum meruit*, BURGESS was entitled to credits and offsets for remedial work and concrete sales to others of \$41,072.48. This credit is reflected in the Certified Audit in evidence as Exhibit D-82.

20. During the trial the parties stipulated to a credit to BURGESS in the sum of \$10,000 to avoid the time which would be required to present evidence on certain possible duplications in the accounting records.

21. After deductions of just credits and offsets, the fair value of MORRIN'S work for which MORRIN has not been paid, including overhead and profit is \$734,664.00 as reflected in Exhibit D-82.

22. MORRIN is entitled to interest at the legal rate of six percent per annum upon the foregoing figure from the date of termination of the subcontract, January 21, 1972, to date of judgment. Said interest amount is \$79,581.00.

23. MORRIN did not breach the subcontract with BURGESS and BURGESS was not damaged in any manner through any actions or inactions of MORRIN.

24. A reasonable amount to allow THE UNITED STATES OF AMERICA FOR THE USE AND BENEFIT OF M. MORRIN & SON COMPANY, INC. as attorneys' fees in these proceedings is \$203,557.00.

From the foregoing FINDINGS OF FACT the Court makes the following:

CONCLUSIONS OF LAW

1. The Complaint of BURGESS CONSTRUCTION COMPANY in Cause No. C-26-72 should be dismissed with prejudice.

2. THE UNITED STATES OF AMERICA FOR THE USE AND BENEFIT OF M. MORRIN & SON COMPANY, INC. is entitled to interest at the rate of six percent per annum upon the principal amount of this Judgment from the date of termination of the subcontract until date of Judgment.

3. THE UNITED STATES OF AMERICA FOR THE USE AND BENEFIT OF M. MORRIN & SON COMPANY, INC. is entitled to judgment in Cause No. C-158-72 against BURGESS CONSTRUCTION COMPANY and GENERAL INSURANCE COMPANY OF AMERICA jointly and severally in the sum of \$814,235.00, together with the additional sum of \$203,557.00, attorneys' fees.

DATED this 12th day of November, 1973.

WILLIS W. RITTER, Chief Justice
United States District Court

APPENDIX (c)

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

BURGESS CONSTRUCTION COMPANY,
an Alaska corporation,
Plaintiff,

vs.

M. MORRIN & SON COMPANY, INC.
a Utah corporation; and GENERAL
INSURANCE COMPANY OF AMERICA,
an insurance company,
Defendants.

C-26-72

USA/FOR THE USE AND BENEFIT OF
M. MORRIN & SON COMPANY, INC.,
a Utah corporation,
Plaintiff,

vs.

BURGESS CONSTRUCTION COMPANY,
an Alaska corporation; and GENERAL
INSURANCE COMPANY OF AMERICA,
a corporation,
Defendants.

C-158-72

JUDGMENT

The Court having heretofore entered its FINDINGS OF FACT AND CONCLUSIONS OF LAW in these consolidated cases,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. The Complaint of BURGESS CONSTRUCTION COMPANY in Cause No. C-26-72 is hereby dismissed with prejudice and with costs to M. MORRIN & SON COMPANY, INC.

2. THE UNITED STATES OF AMERICA FOR THE USE AND BENEFIT OF M. MORRIN & SON COMPANY, INC. is hereby granted judgment in Cause No. C-158-72 against BURGESS CONSTRUCTION COMPANY and GENERAL INSURANCE COMPANY OF AMERICA jointly and severally in the sum of \$814,235.00, together with the additional sum of \$203,557.00, for attorneys' fees.

DATED this 12th day of November, 1973.

WILLIS W. RITTER, Chief Justice
United States District Court

APPENDIX (d)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

BURGESS CONSTRUCTION COMPANY,
an Alaska corporation,
Plaintiff,

vs.

M. MORRIN & SON COMPANY, INC.
a Utah corporation; and GENERAL
INSURANCE COMPANY OF AMERICA,
an insurance company,
Defendants.

USA/FOR THE USE AND BENEFIT OF
M. MORRIN & SON COMPANY, INC.,
a Utah corporation,
Plaintiff,

vs.

BURGESS CONSTRUCTION COMPANY,
an Alaska corporation; and GENERAL
INSURANCE COMPANY OF AMERICA,
a corporation,
Defendants.

C-26-72
ORDER OPENING,
VACATING, AND
SETTING ASIDE
JUDGMENT,
FINDINGS OF
FACT, AND
CONCLUSIONS
OF LAW
and
ENTERING NEW
FINDINGS OF
FACT AND
CONCLUSIONS
OF LAW

C-158-72

The above cases, Civil Action C-26-72, including the complaint of Burgess Construction Company ("Burgess") and the counterclaim of M. Morrin & Son, Inc. ("Morrin"), and Civil Action C-158-72, including the complaint of the United States of America for the use and benefit of Morrin and the

answer of Burgess and General Insurance Company ("General"), having been consolidated for trial, came on regularly to be heard on October 16, 1973, before the Honorable Willis W. Ritter, Chief United States District Judge, sitting without a jury.

Burgess and General, Burgess' surety, were represented by their attorneys, David K. Watkiss, Esq., and Robert S. Campbell, Jr., Esq., of Pugsley, Hayes, Watkiss, Campbell & Cowley; and Morrin and General, Morrin's surety, were represented by their attorneys, Clifford L. Ashton, Esq., of Van Cott, Bagley, Cornwall & McCarthy; Patrick A. Sullivan, Esq., Robert J. McNichols, Esq., and Robert Taylor, Esq., of Winston, Cashatt, Repsold, McNichols, Connelly & Driscoll; and Blaine V. Glasmann, Esq., of Young, Thatcher & Glasmann.

The parties rested their respective cases on November 10, 1973, after nine days of trial and an intervening continuance. Thereupon the Court directed counsel for Morrin to prepare and present Findings of Fact and Conclusions of Law and Judgment. On November 12, 1973, the Court adopted and entered Findings of Fact and Conclusions of Law and Judgment which in Civil Action C-158-72 found in favor of Morrin and against Burgess and General, jointly and severally, in the amount of \$814,235 together with attorneys' fees in the sum of \$203,557 for a total Judgment of \$1,017,792, and in Civil Action C-26-72 dismissed the complaint of Burgess with prejudice.

Burgess filed timely motions pursuant to the Federal Rules of Civil Procedure to alter and amend the Judgment under Rule 59 (e), for a new trial under Rule 59 (a), for relief from the Judgment under Rule 60 (b), and to amend and supplement the Findings of Fact and Conclusions under Rule 52. These motions were heard on May 9, 1974, each party having submitted briefs in support of their respective

positions. Further oral argument was presented on June 28, 1974.

The Court is now fully advised in the premises, and it appearing to the Court that the Findings of Fact, Conclusions of Law and Judgment of November 12, 1973, were inappropriate and erroneous and should be vacated and set aside and that the Court should open the Judgment and make new Findings of Fact and Conclusions of Law and then enter a new superseding Judgment;

NOW, THEREFORE, pursuant to Rule 59 (a) and Rule 59 (e) of the Federal Rules of Civil Procedure

IT IS ORDERED that the Judgment entered in the above entitled actions on November 12, 1973, be and the same is hereby opened, set aside and vacated, that the Findings of Fact and Conclusions of Law entered on November 12, 1973, be and the same are hereby annulled, vacated and set aside, and that new Findings of Fact and Conclusions of Law be and are hereby made as follows:

FINDINGS OF FACT

A. Jurisdiction of the Court

1. This Court has jurisdiction of Civil Action C-26-72 under 28 U.S.C. §1332 (70 Stat. 658) in that the amount in controversy, exclusive of interest and costs, exceeds the sum of \$10,000 and is between citizens of different states; and of Civil Action C-158-72 under 28 U.S.C. §1331 in that it arises under 40 U.S.C. §270, *et seq.* (Miller Act).

B. The Parties

2. Burgess, an Alaska corporation, is a general contractor doing business in the State of Utah.
3. Morrin, a Utah corporation with its principal office in Odgen, is engaged in general construction.

4. General, a Washington corporation, was the corporate surety on the payment and performance bonds on this project for both Burgess and Morrin.

C. The Subcontract Agreement

5. In August 1970 the United States Bureau of Reclamation advertised for bids for the construction of a 265 foot earthen dam on Soldier Creek, approximately 80 miles east of Salt Lake City, Utah.

Burgess submitted a bid and on October 17, 1970, was awarded the contract for the project by the Bureau.

6. Morrin gave Burgess a verbal quote for the concrete and certain other project work prior to the submission of the Burgess bid to the Bureau and, following the award of the contract to Burgess, entered into further discussions with Burgess which culminated in execution of a Subcontract Agreement on November 4, 1970, after Morrin had been made aware of Burgess' work schedule.

7. The Subcontract Agreement required Morrin to perform all of the concrete work on the project. It was on a printed form with two type-written exhibits attached, designated Exhibit A and Exhibit B. Exhibit A set forth the unit prices of the Morrin work and additional contractual provisions not covered in the printed form. Exhibit B dealt specifically with the time for completion of Morrin's work.

8. The only portion of the subcontract work relevant to this litigation is the concrete work required to divert Soldier Creek through the lower tunnel. This encompassed the concrete work in the stilling basins and lower chute; the lower tunnel, including the inlet, the outlet, the gate chamber, the lower adit and lower portion of the shaft; and the lower intake structure, including the lower trash rack.

D. Time for Performance Under Subcontract

9. Under the Subcontract Agreement, Morrin was ob-

ligated to complete all concrete work to allow diversion of the river through the lower tunnel on or before August 1, 1971. This date was crucial because the dam embankment could not be constructed until the river had been diverted through the lower tunnel.

Morrin's obligation to complete the concrete work for diversion through the tunnel on or before August 1, 1971, was expressly subject to and conditioned upon the following conditions precedent:

- a. that the lower tunnel excavation be completed so as to allow access from both ends by April 1, 1971;
- b. that the excavation for the lower tunnel chute and the stilling basin be completed by April 1, 1971;
- c. that the gates and steel tunnel liners for the lower gate chamber be delivered to the project site on or before May 15, 1971, and installed not later than June 1, 1971.

Accordingly, under the Subcontract Agreement, Morrin was allowed four months, from April 1 to August 1, 1971, to perform its concrete work in the lower tunnel and in the stilling basin and two months, from June 1 to August 1, 1971, to complete its work in the area of the gate chamber.

10. Burgess did not promise to have the lower tunnel, lower tunnel chute, and stilling basin excavation complete by April 1, 1971, or to have the gates and steel liners installed by June 1, 1971. The Subcontract Agreement provided that, in the event any of the foregoing conditions precedent did not occur on or before the specified dates, Morrin was entitled to a time extension equal to the period of the delay. This extension of time was Morrin's only relief for any such delay.

11. The time set forth in the Subcontract Agreement for completion by Morrin of the concrete work for diversion, after the occurrence of the conditions precedent, was of the essence.

E. Manner in Which Morrin Was to Perform

12. In the Subcontract Agreement Morrin agreed to prosecute its work in a proper, efficient and workmanlike manner; to perform the concrete work at such times and in such order as Burgess determined to be necessary to keep the concrete work sufficiently in advance of the other parts of the project; and to avoid any delay in the completion of the project as a whole. Morrin additionally agreed not to delay, interfere with, or hinder the work of the contractor or any other subcontractor.

13. The Subcontract Agreement required Morrin to furnish Burgess, upon request, schedules indicating the time and place of the performance of its required work.

14. After the execution of the Subcontract Agreement, Morrin submitted a schedule showing the sequence in which it planned to do the concrete work on the project. This schedule indicated that Morrin would work first in the lower tunnel inlet, commencing March 28, 1971, and finishing May 7, 1971, and then in the lower tunnel outlet, commencing May 10, 1971 and finishing July 17, 1971. The outside work in the stilling basin and lower chute was also scheduled to begin May 10, 1971 and to finish July 17, 1971.

F. Morrin's Performance

15. The periods of time actually required by Morrin to perform the work in each area were:

a. The stilling basin: Morrin was provided access to this area on April 26, 1971, and commenced work there on that date. Except for a ten day period in late August, Morrin worked continuously in this area, forming, pouring, and doing remedial work until approximately December 8, 1971, when work there was completed. To complete this work, Morrin required more than three times the time it had scheduled.

Pursuant to an agreement between the parties, an unexcavated area referred to as the "plug" was left in the stilling basin just outside the downstream end of the lower tunnel. This plug did not interfere with Morrin's work except when it was excavated during a ten day period just prior to September 1, 1971.

b. Lower tunnel outlet: Morrin had access to the lower tunnel through the downstream end and commenced work in the lower tunnel outlet on May 18, ten days after the date it had scheduled this work. Morrin did not, however, complete this work until October 27, 1971, requiring 105 work days instead of the 48 it had scheduled.

c. Lower tunnel inlet: The lower tunnel inlet and upstream portal were available to Morrin on June 21, 1971, when all underground excavation was completed. Morrin did not, however, immediately commence its work in this tunnel. In July, Burgess, concerned about the lack of progress of Morrin's work, requested Morrin to begin work in this area. However, Morrin did not commence to pour the required placements in this area until November 1, 1971.

d. Gate chamber: The unavailability of the stainless steel required for the fabrication of the gates and liners delayed their delivery to the work site until September 15, 1971. Because Morrin was then working in the lower outlet tunnel through which the gates and liners had to be taken, the gates and liners were not transported into the gate chamber until early November. Installation was completed on December 27, 1971. The delay in the installation of the gates and liners prevented Morrin from performing only the concrete work required in the gate chamber. All other work areas were available to Morrin and unaffected by the delay in installation of the gates and liners.

16. The Subcontract Agreement allowed Morrin four months to complete the stilling basin after access was given,

four months to complete the lower tunnel after access was given, and two months to complete the gate chamber after access was given.

a) Morrin was given access to the stilling basin on April 26, 1971. Therefore, it had until August 26, 1971, to complete the stilling basin. Yet this work was not completed until December 8, 1971, some three and one half months late.

b) Morrin was given access from both ends of the lower tunnel on June 21, 1971. Therefore, it had until October 21, 1971, to complete its required work in the lower tunnel. Yet this work was *not* completed by Morrin as of January 21, 1972, (Morrin's last day on the job), which was some three months late.

c) Morrin was given access to the gate chamber on December 27, 1971. Therefore, it had until February 27, 1972, to complete the gate chamber. Since the gate chamber was the final portion of the work necessary for diversion, Morrin had until February 27, 1972, to complete the entire first phase of the concrete work.

17. Morrin could not have completed the entire first phase of the concrete work — that is, the work required for diversion — by February 27, 1972. Morrin acknowledged to Burgess in January, 1972, that it could not complete its work within the time allowed by the Subcontract Agreement, and Morrin's past performance confirmed its admissions. As of January 21, 1972, Morrin had completed only the stilling basin and the outlet portion of the lower tunnel. All of the remaining areas — namely, the lower inlet tunnel, gate chamber, lower intake structure, lower adit and lower portion of the shaft — were unfinished. In the latter three areas, work had not even begun. Morrin thus substantially and materially failed to perform the concrete work in the time and manner required by the Subcontract Agreement.

18. Morrin orally and in writing stated to Burgess prior to January 21, 1972, that it could not complete its work until April 30, 1972. This date — even assuming Morrin could have performed by then — was materially beyond the February 27, 1972 date required under the Subcontract Agreement. Morrin's explicit statements of inability to perform, together with its past failures of performance, constituted an anticipatory breach of the Subcontract Agreement by Morrin.

19. In addition, Morrin substantially and materially failed to perform the concrete work in a workmanlike manner, refused to proceed with the work in the time and manner directed by Burgess, and failed and refused to provide Burgess with requested work schedules, all as required under the Subcontract Agreement. These failures were unexcused.

20. Morrin's delayed performance and the cost overruns that resulted therefrom were the responsibility of Morrin under the terms of the Subcontract Agreement. While Morrin encountered certain areas in the lower outlet tunnel with protrusions of rock known as tights which it had to remove, the evidence established that such tights were minor in nature and unsubstantial and that Morrin did not experience significant delay or costs as a result thereof.

G. Remedies for Breach Under the Subcontracts

21. The Subcontract Agreement provided that in the event Morrin failed to comply or became disabled from complying with the Subcontract provisions as to the character of the work or the time of performance; or if Morrin refused to proceed with the work as directed by Burgess or failed to perform the work in accordance with the terms and provisions of the Subcontract Agreement, in whole or in part; or if Morrin failed to perform any terms, covenants or conditions contained in the Subcontract Agreement, Burgess could, at its option and upon three days written notice to Morrin, take over the Morrin work under the Subcontract Agreement and

utilize Morrin's equipment to complete the work remaining to be done.

22. The Subcontract further provided that in the event that Burgess deemed the foregoing takeover procedure necessary, Morrin agreed to pay to Burgess all monies Burgess expended in the completion of the contract over the amount otherwise due Morrin under the contract, with interest thereon at the rate of six percent per annum. Burgess was authorized to withhold monies and funds due to Morrin under the Subcontract payment schedule as a setoff against any damages or costs sustained or incurred by Burgess as a result of Morrin's breach or default.

23. The Subcontract also required Morrin to reimburse Burgess for any consequential loss, damages, or extra expenses paid or incurred by Burgess which were due to Morrin's failure properly to perform all work in keeping with the progress of the general construction work or its failure to properly perform any term, covenant, or condition contained in the Subcontract.

H. Burgess Takeover and Completion of Concrete Work

24. Pursuant to and in accordance with the terms of the Subcontract Agreement, Burgess gave written notice to Morrin on January 17, 1972, that it intended to take over the concrete work on January 21, 1972, and utilize some of the Morrin equipment and materials located on the job site to complete such work.

25. On January 21, 1972, Burgess took possession of certain items of Morrin's equipment and material and thereafter prosecuted the unfinished concrete work to completion in accordance with the express provisions of the Subcontract authorizing such actions.

I. Burgess' Damages

26. Burgess incurred \$1,320,628.45 in total direct costs

to complete the Subcontract Agreement after January 21, 1972. This sum is composed of the following elements:

A. Burgess Direct Costs to Complete Morrin Subcontract After 1/17/71	\$1,153,202.48
Labor, insurance, taxes & fringes	\$629,670.32
Equipment, ownership, rental, M&R	\$168,652.43
Materials	\$303,614.50
Other subcontractor at work	\$ 37,475.23
Added cost (estimate) to complete balance of subcontract work	\$ 13,790.00
B. Home Office and Project Overhead at 15.6%	\$ 181,312.47
C. Less: Outside Concrete Sales	-\$ 13,886.50
Total Cost to Burgess to complete Morrin Contract (¶ A + B - C)	<u>\$1,320,628.45</u>

27. The total allowable costs for the work covered by the Subcontract prior to January 21, 1972 is composed of the following elements:

A. Total payments made to Morrin under the Subcontract Agreement	\$ 520,514.17
B. Amount earned by Morrin but unpaid as of January 21, 1972	\$ 173,586.57
C. Services and supplies furnished by Burgess on Subcontract work	\$ 4,264.28
Total value of work performed under the Subcontract	<u>\$ 698,365.02</u>

28. The total damages sustained by Burgess by reason of Morrin's breach and authorized to be collected by the terms of the Subcontract Agreement is the amount of \$330,345.88, which is computed as follows:

A. Total direct costs incurred by Burgess to complete the Subcontract Agreement	\$1,320,628.45
B. Payments to Morrin for work performed under the Subcontract	520,514.17
C. Services and supplies furnished by Burgess on Morrin Subcontract work	4,264.28
TOTAL	<u>\$1,845,406.90</u>
Less: Subcontract Price as set out in Subcontract	<u>-1,515,061.02</u>
TOTAL DIRECT BURGESS DAMAGES	<u>\$ 330,345.88</u>

29. The stipulated fair market value and replacement cost of equipment belonging to Morrin which Burgess took over pursuant to the Subcontract Agreement and utilized to complete the Subcontract work totals \$38,515.16. This amount and the amount of \$173,586.57, earned by Morrin but unpaid, are not credited to Morrin because they have not been included in Burgess' costs to complete the Subcontract work.

30. The Subcontract Agreement provides for the payment of interest at the rate of six percent per annum on the amount which Burgess is entitled to recover, which rate of interest is reasonable. Under the Subcontract Agreement, interest is chargeable from the date of billing. The Court finds that in the instant case the billing date did not occur until October 23, 1973, the date on which Burgess formally presented its damages case at trial.

31. Additionally, Burgess claimed consequential damages in the sum of \$352,171 in connection with the work it performed in constructing the dam embankment. It claimed that these damages were a direct and natural result of Morrin's breaches and failure to perform its Subcontract. While it appeared that such additional costs were in fact incurred by Burgess, there was a failure by Burgess to prove that such costs were attributable solely to the default of Morrin. Such damages are accordingly not awardable to or recoverable by Burgess.

Having made the foregoing Findings of Fact, the Court makes the following

CONCLUSIONS OF LAW

1. The Subcontract Agreement between the parties was a valid and subsisting contract and controls the rights of the parties.

2. Under the Subcontract Agreement, the sole and exclusive remedy available to Morrin for any delay in being

provided access to the work areas was an extension of time equal to the period of delay.

3. Under the Subcontract Agreement, Morrin was entitled to a time extension to complete the concrete work for diversion until two months after December 27, 1971, that is, until February 27, 1972.

4. Morrin anticipatorily breached the Subcontract Agreement by stating, orally and in writing, prior to January 21, 1972, that it would not perform by February 27, 1972, the concrete work necessary for diversion, and by performing its work prior to January 21, 1972 in such a manner as to be disabled from completing the concrete work necessary for diversion by February 27, 1972.

5. Morrin further breached the Subcontract Agreement by failing to prosecute the work in a timely and efficient manner, by failing to perform the work required in a workman-like manner, by failing and refusing to proceed with the work in the time and manner directed by Burgess, and by failing to provide Burgess with requested work schedules, all as required by the Subcontract Agreement.

6. Morrin's breaches of the Subcontract Agreement were substantial and material.

7. Burgess was entitled, under the Subcontract Agreement, to take over and complete the subcontract work utilizing the equipment and materials of Morrin.

8. Burgess was damaged as a direct and proximate result of Morrin's breaches in the amount of \$330,345.88 and is entitled to recover such sum from Morrin and to judgment therefor.

9. Burgess is not entitled to recover its claim of consequential damages in the sum of \$407,109.00 in connection with work performed by Burgess in constructing the dam embankment.

10. Burgess is entitled to recover interest on the sum of \$330,345.88 at the rate of six percent per annum from October 23, 1973.

11. Burgess is entitled to recover its allowable costs and disbursements incurred herein.

12. Morrin's complaint in Civil Action C-158-72 and counterclaim in Civil Action C-26-72 should be dismissed with prejudice.

WHEREFORE, having made the foregoing Findings of Fact and Conclusions of Law, let judgment enter accordingly.

DATED this 29 day of Aug., 1974.

BY THE COURT:

WILLIS W. RITTER
Chief United States District Judge

APPENDIX (e)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

BURGESS CONSTRUCTION COMPANY,
an Alaska corporation,
Plaintiff,

VS.

M. MORRIN & SON COMPANY, INC.
a Utah corporation; and GENERAL
INSURANCE COMPANY OF AMERICA,
an insurance company,
Defendants.

C-26-72

USA/FOR THE USE AND BENEFIT OF
M. MORRIN & SON COMPANY, INC.,
a Utah corporation,
Plaintiff,

VS.

BURGESS CONSTRUCTION COMPANY,
an Alaska corporation; and GENERAL
INSURANCE COMPANY OF AMERICA,
a corporation,
Defendants.

C-158-72

JUDGMENT

The Court having opened, set aside, and vacated the Judgment entered in the above entitled consolidated actions on November 12, 1973, and having annulled, vacated, and set

aside the Findings of Fact and Conclusions of Law entered on that date and having now entered new Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Burgess Construction Company is hereby granted Judgment in Case No. C-26-72 against M. Morrin & Son, Inc. and General Insurance Company of America, jointly and severally, in the sum of \$330,345 with interest thereon at the rate of six percent from October 23, 1973 until this date for a total Judgment in the sum of \$345,154, together with its costs incurred herein.

2. The Complaint of the United States of America for the use and benefit of M. Morrin & Son, Inc. in Case No. C-158-72 and the Counterclaim of M. Morrin & Son, Inc. in Case No. C-26-72 are hereby dismissed with prejudice and with costs to Burgess Construction Company.

DATED this 29 day of Aug., 1974.

WILLIS W. RITTER, Chief Judge
United States District Court